Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RICKEY B. WALLACE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the recognized errors in both Defendant's indictment and guilty plea colloquy under the rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) met the plain error standard in that they seriously affected the fairness, integrity, or public reputation of the judicial proceedings?

2. Did the Seventh Circuit err when it determined that the district court disqualified Defendant's attorney based only on future conflicts thus violating Defendant's Sixth Amendment right to the effective assistance of counsel at the time that he entered his guilty plea?

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OPINIONS BELOW

Rickey Wallace, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on January 9, 2002. The petition for rehearing *en banc* was denied on February 4, 2002. The January 9, 2002, opinion of the Court of Appeals, the judgment of which is sought in this petition to be reviewed, is found at 276 F.3d 360 (7th Cir. 2002), and is reprinted in the separate Appendix to this petition at pp. 1-17. The prior opinion of the United States District Court for the Southern District of Illinois, entered June 9, 1998, No. 97-30006-01-WDS, is an unpublished decision, and is reprinted in the separate Appendix to this petition at pp. 18-26. The judgment in the case was entered on November 1, 2000.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment VI. Jury trials for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 841(a). Prohibited acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF THE CASE

Petitioner Rickey Wallace was charged in the Superseding Indictment pursuant to 21 U.S.C. §§ 841(a)(1) and 846 with conspiracy to distribute marijuana (Count I) and with a Criminal Forfeiture Action pursuant to 21 U.S.C. § 853 (Count II). On advice from counsel, Clifford M. Schwartz, Wallace entered an open plea of guilty to Count I of the Superseding Indictment. Along with his plea, Wallace agreed to stipulated facts which specified his involvement with 1,600 pounds (approximately 720 kilograms) of marijuana. However, the Plea Agreement was open in that it provided in Part III: "There is no agreement as to what the Defendant's sentence will be.

There is no agreement as to what the Defendant's sentencing guideline range will be." Moreover, the Plea Agreement did not contemplate a reduction in sentence for cooperation with the Government.

Mr. Wallace entered his plea of guilty based upon the advice from his counsel that his sentence would be based on involvement with 1,600 pounds of marijuana and that he would receive a sentence of 60 months. He was also led to believe that he would receive a reduction in his sentence if he cooperated with the Government. In addition, he entered his plea with the understanding that the Government would be required to present witnesses who would be cross-examined at the sentencing hearing. Subsequently, the United States brought a motion to disqualify attorney Schwartz on grounds that there was a conflict of interest between the attorney and his client. The court granted the Government's motion and disqualified attorney Schwartz from further representation.

Prior to the disqualification of attorney Schwartz, Wallace moved to withdraw his guilty plea. Under the representation of new counsel, Wallace filed an amended motion to withdraw his guilty plea on the ground that the plea was entered based upon advice from counsel whose interests conflicted with Wallace's in violation of his constitutional rights and on the ground that he misunderstood the consequences of the plea. The court denied Wallace's motion to withdraw.

Wallace was sentenced to 240 months' imprisonment. Wallace's life expectancy is far less than the 20 years to

which he was sentenced. Therefore, his sentence is effectively a life sentence, which exceeds the statutory maximum for the crime to which he pleaded guilty.

The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Seventh Circuit should be reviewed by this Court because it has decided an important federal question in a way that conflicts with this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). After *Apprendi*, the quantity of drugs charged under § 841 is a fact which must be pleaded in the indictment, submitted to the jury, and proved beyond a reasonable doubt because drug quantity can increase the penalty for a crime beyond the prescribed statutory maximum. *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000); *see also United States v. Nance*, 236 F.3d 820 (7th Cir. 2000). A defendant who pleads guilty without knowing the Government's burden concerning drug quantity, where that fact establishes the statutory maximum, has not made a knowing and intelligent plea as required by federal Rule 11 and the Constitution.

Here, Wallace was not adequately informed of the essential elements of the charges against him. The Superseding Indictment charging Wallace with violation of 21

U.S.C. § 841(a) does not specify any quantity of marijuana. Moreover, the court failed to advise him that he had the right to insist that the Government prove beyond a reasonable doubt the quantity of marijuana which would be considered at his sentencing.

Indeed, in its opinion, the Seventh Circuit held that there was error both in Wallace's indictment and in the plea colloquy. 276 F.3d 360, 369 (7th Cir. 2002). However, in order to satisfy the plain error requirement held to be applicable in the present case, the *Apprendi* mistakes below had to have "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* The district court's mistakes here clearly meet this standard. The Seventh Circuit reasoned that there was no such effect on the judicial proceedings because Wallace failed to deny his involvement in the two transactions totaling 1,600 pounds of marijuana and he admitted to the quantities of marijuana. However, the court ignored the glaring fact that all of these statements were made while Wallace was being represented by an attorney who was subsequently disqualified by the district court for a serious conflict of interest. Even the Seventh Circuit held that this conflict of interest existed at the time of Wallace's guilty plea. *Id.* at 367. Therefore, an *Apprendi* error combined with Wallace's counsel's conflict of interest gravely impacts the integrity and the fairness of the judicial proceedings here and meets the plain error standard.

These facts distinguish this case from *United States v. Gilliam*, 255 F.3d 428 (7th Cir. 2001) and *Lee v. United States*, 113 F.3d 73 (7th Cir. 1997), cited by the Seventh Circuit, because no conflict of interest meriting disqualification of defendant's counsel was present in those

cases. Thus, the integrity of the judicial proceedings was not similarly impugned. Consequently, the Seventh Circuit erred when it allowed these errors to go unchecked after *Apprendi*.

Additionally, in *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001), *cert. granted*, 122 S. Ct. 803 (2002), the court held that it was reversible plain error to impose sentences on the defendants for crimes with which the defendants were never charged which resulted from a failure to charge a specific threshold drug quantity in the indictment and submit it to the jury. In *Cotton*, the court concluded that sentencing a defendant for an unindicted crime seriously affects the fairness, integrity, and public reputation of the judicial proceedings. *Id.* at 406. The court declined to ignore the error based on the government's arguments that the evidence adduced at trial overwhelmingly established the threshold drug quantities for an aggravated drug trafficking offense. *Id.* at 407. Although the court acknowledged that the government may be correct as a factual matter, it found that the quantum of evidence was not a relevant consideration when the error stems from a defect in the indictment. *Id.* Accordingly, the sentence was vacated and remanded for re-sentencing with instructions.

Likewise, in the present case there is plain error due to the Government's failure to include the relevant drug quantities in Wallace's indictment. However, like the government's unavailing argument in *Cotton*, the Seventh Circuit asserts that the admissions of the quantities by Wallace obviated this error. Nevertheless, under the rule in *Cotton*, the quantum of evidence is not relevant when the error stems from a defect in the indictment as it does

here. It follows that Wallace's constitutional rights were violated and he is minimally entitled to a remand for resentencing.

On the second question presented for review, the Seventh Circuit committed reversible error when it misconstrued the holding of the district court granting disqualification of Defendant's attorney, Clifford Schwartz, as limited only to potential future conflicts based upon the fact that Schwartz was charged with wrongdoing by the government. The Seventh Circuit states:

> If the government's allegations of Schwartz's participation in witness-tampering were true, then Schwartz had an actual conflict throughout the proceedings, including when he advised Wallace regarding his guilty plea. Even if the government's allegations were not true, however, the mere fact that Schwartz was charged with wrongdoing created the potential for his interests to conflict with Wallace's, and it certainly created a potential public perception of impropriety. The district court disqualified Schwartz based only on these potential future conflicts. It expressed no opinion on whether the evidence supported the government's charges against Schwartz and thus whether Schwartz had an actual conflict at the time Wallace pleaded guilty.

276 F.3d 360, 367 (7th Cir. 2002). Yet this construction does not accurately reflect the district court's holding.

The actual language of the district court's opinion reads as follows:

> In this case, because Schwartz was present at the Diaz home where the illegal actions and offers

> were allegedly made by Wallace, there is a strong likelihood that the public perception (whether true or not), would be that Schwartz participated, actively or passively, in the attempts to obstruct justice and influence witnesses. Therefore, disqualification of Schwartz is warranted under these circumstances because of the appearance of impropriety in his continued representation of Wallace.
>
> The potential conflicts presented by Schwartz's continued representation are too great to be ignored by this Court. This situation certainly raises the possibility that 'the defense attorney [may be] required to make a choice advancing his own interests to the determent [sic] of his client's interests.' *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994), *quoting United States v. Ziegenhagen*, 890 F.2d 937, 939 (7th Cir. 1989).

In comparing the actual district court holding to the Seventh Circuit's interpretation of it, it is clear that the court misapprehended the district court's ruling. The district court said that it was *"because Schwartz was present at the Diaz home where the illegal actions and offers were allegedly made by Wallace . . . "* that there would be a strong likelihood that the public perception, true or not, would be that Schwartz participated, actively or passively, in the attempts to obstruct justice and influence witnesses. It did not say, contrary to the Seventh Circuit's interpretation, that it was because Schwartz was merely ***charged*** with such wrongdoing that this created the potential for a conflict of interest and a potential public perception of impropriety. The district court made no mention of the mere allegations as opposed to the actual alleged conduct.

This distinction is crucial because the district court's determination as written illustrates that Schwartz indeed had a conflict of interest at the time that he represented Wallace in entering into the guilty plea. If this is so, then, as the Seventh Circuit acknowledged in its opinion, Schwartz would have had an actual conflict throughout the proceedings, including when he advised Wallace regarding his guilty plea. In fact, it is difficult to see how Schwartz could have had an actual conflict as alleged here, yet its ill-effects could only have been viewed as potential or harmful in the future – in other words, only after the government's motion to disqualify had been heard. A literal reading of the district court's order shows that it explicitly held that Schwartz had an actual conflict because of his presence at the Diaz home in 1997 when the alleged witness-tampering took place. Moreover, the record reflects that Wallace was indicted in 1997. The government alleged that Schwartz visited potential witnesses in Texas after the indictment in 1997 and was present during witness-tampering at that time. Wallace entered his guilty plea on February 3, 1998. Consequently, if the strong likelihood that the public perception would be that Schwartz participated, actively or passively, in the attempts to obstruct justice and influence witnesses arises because of Schwartz's presence during the allegedly illegal activity in 1997, then this most certainly taints the representation that Wallace received when he entered his guilty plea in 1998 and agreed to the amounts, as well as his subsequent representation. Thus, arguably, the district court found that a conflict actually existed at the time of Wallace's guilty plea. At worst, it could be said that the district court ignored the possibility of the actual conflict

arising at the time of the guilty plea. In either case, this ambiguity should mandate reversal.

If the district court found an actual conflict of interest on these facts necessitating Schwartz's removal from this case, then that conflict began the moment Schwartz engaged in the allegedly illegal activities in 1997 – not when the conflict was brought to light by the government's motion. The district court cannot be permitted to find an actual conflict of interest that arose in 1997, yet project forward the adverse impact from the time the court becomes aware of the conflict rather than the time it arises and potentially taints the Defendant's representation. This leaves out the most crucial time when Schwartz represented Wallace, that is, when he brought the case to resolution. This strained reasoning is the only way that the court can keep Wallace's guilty plea intact. Yet it cannot stand as good law here.

Additionally, the Seventh Circuit misconstrued Wallace's argument regarding adverse impact. Wallace also demonstrated adverse impact by the possibility that Schwartz urged Wallace to plead guilty to ensure that there would be no witness testimony at all. In this way, Schwartz guaranteed that he would not be called as a witness and that no other witness testimony implicating him would be given. Wallace also testified that when he pleaded guilty he believed that he was making a choice between taking a sentence of 5 years or going to trial and getting a possible sentence of 15 years. Schwartz incorrectly told him that the benefit of entering a plea of guilty was that he would get a sentence of five years and he would either get one year of credit for the time he spent on the monitor or he would get one-third off of his

sentence for cooperation with the marshals. The adverse impact is further revealed by Schwartz's advice that Wallace enter an open plea of guilty without properly advising him of the consequences of the plea. Minimally, the guilty plea on its face, even without Wallace's testimony, is a bad deal for Wallace. It defies logic that a criminal defendant would enter into a guilty plea that results in a higher sentence than that which would have been available after a trial. Despite the Seventh Circuit's ruling, these facts clearly satisfy the standards under *Cuyler v. Sullivan*, 446 U.S. 335 (1980) for establishing a violation of Wallace's Sixth Amendment right to the effective assistance of counsel, thus the Seventh Circuit erred when it construed the facts and the law here. Consequently, this Court's review is imperative.

CONCLUSION

For the above reasons, Petitioner Rickey B. Wallace respectfully requests that his petition for a writ of certiorari be granted.

Dated: May 3, 2002.

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276 F.3d 360

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Rickey B. WALLACE, Defendant-Appellant.

No. 00-3939.

Argued May 10, 2001.
Decided Jan. 9, 2002.

Rehearing and Rehearing En Banc Denied Feb. 4, 2002.

Randy G. Massey (argued), W. Charles Grace, Office of U.S. Atty., Criminal Div., Fairview Heights, IL, for Plaintiff-Appellee.

John J. O'Gara, Jr. (argued), Belleville, IL, for Defendant-Appellant.

Before POSNER, EASTERBROOK, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

Rickey B. Wallace was a big-time marijuana dealer in Southern Illinois. Over the years, he was responsible for transactions amounting to a whopping 13,471 kilograms of that substance, according to one of his co-conspirators, Ubaldo Diaz II. Law enforcement authorities caught up with him in early 1997, when he was indicted along with several others for conspiring to distribute "divers amounts of marihuana" from approximately 1987 through September 1997, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He pleaded guilty, but then thought better of matters after he learned that he would be held

responsible for such a large quantity. His motion to withdraw his guilty plea became complicated by the near-simultaneous discovery that his first lawyer allegedly had a serious conflict of interest. In the end, the district court denied Wallace's motion (filed by a new lawyer) to withdraw the plea and sentenced Wallace to 240 months' imprisonment. Wallace appeals, and we affirm.

I

At the time of his guilty plea, Wallace was 50 years old and the owner of a roofing business in Southern Illinois. Represented by attorney Clifford Schwartz, Wallace stipulated in writing that between 1987 and November of 1994, he was a leader of an organization that distributed marijuana in and around Granite City, Illinois. Wallace admitted that during this period he regularly received large quantities of marijuana from suppliers in Texas, including co-conspirator Diaz. Wallace also admitted that on two different occasions in 1994 (July and October), law enforcement officials seized from Diaz separate 800-pound shipments of marijuana (a total of over 700 kilograms) that were intended for Wallace.

In his plea agreement, Wallace acknowledged that his offense was subject to the United States Sentencing Guidelines and that his sentence would be determined by the court. The plea agreement noted that the sentence would depend on the amount of marijuana the court found should be counted as relevant conduct, and that if the amount exceeded 100 kilograms, he was facing a sentence ranging from 5 to 40 years. Finally, Wallace confirmed in the plea agreement that there were no

agreements or promises relating to the length of his sentence.

On February 3, 1998, prior to accepting Wallaces plea, the district court conducted a lengthy Rule 11 colloquy. In the course of that exchange, Wallace stated under oath that he had discussed the indictment and the evidence against him with his attorney, Schwartz. Turning to the plea agreement, the court asked Wallace to confirm the fact that the plea agreement contained no commitments about his expected sentence. Asked if he understood this, Wallace replied, Yes, sir. The court then again asked whether anyone made any other or different promise or assurance of any kind to you, and Wallace replied, No, sir.

The court then explained to Wallace that the penalty provided by law for the offense to which you are pleading is governed by the amount of controlled substance found to constitute your relevant conduct. Here we have no agreement as to that amount. That is something that I will have to determine at a later date. After reviewing all the possible relevant conduct ranges and the potential sentences that could attach, the court asked, Now do you understand all of those possible consequences of your plea? Wallace said that he did. He also affirmed that he had discussed how the sentencing guidelines might apply in his case with Schwartz. Finally, Wallace agreed that he understood that the court will not be able to determine the applicable guideline range in your case until after a presentence report has been prepared.

Next, the government spelled out what it was prepared to prove at trial, including the two 800-pound

shipments of marijuana that government agents seized from Diaz in 1994. Following the recitation the court asked, Mr. Wallace, is what [the government] has just told us substantially correct? Wallace responded: Would that total be 1,600 pounds? Clarifying, the court answered, Well, as I understand it, the amount constituting your relevant conduct is not agreed to, but that there, in this recital of the facts . . . [the government] talked about- . . . two shipments of 800 pounds. So is what he told us substantially correct? Wallace agreed that it was, and also agreed that the stipulation of facts was accurate.

After entering his guilty plea, but before the conclusion of the change of plea hearing, Wallace interrupted the court to ask whether at sentencing the court would judge what can be put in?" He asked, "When the government puts on what I consider to be lies that has been told, then you are going to judge that, is that true? The court answered that [i]t will be just like a trial. The government is going to put on evidence. . . . You are going to have the right, or your attorney will have the right, to cross-examine their witnesses. Your side is going to have the right to put on witnesses . . . and after all of that, then I have to make a determination. Wallace then asked, We're almost having a trial then, arent we?, and the court replied that [s]ome of these sentencings come down to a mini trial. All it is is a trial over the amounts. . . . Does that answer your question? Wallace said it did.

Following Wallaces guilty plea, the United States Probation Office prepared a presentencing report. Relying largely on information provided by Diaz, the report found Wallaces relevant conduct during the seven years

of the conspiracy to include marijuana transactions totaling 13,471 kilograms (almost 30,000 pounds). Apparently surprised by the relevant conduct recommendation, Wallace filed, through Schwartz, a motion to withdraw his guilty plea.

This was where matters veered from the beaten track. Before the court had an opportunity to rule on Wallaces motion, the government moved to disqualify Schwartz. It accused Schwartz of either witnessing or participating in suborning perjury and witness tampering by Wallace. In particular, it alleged that while Wallace was out on bond, he and Schwartz had gone to Rio Grande City, Texas, to interview members of Diaz's family. While there, Wallace told Diazs sister Isabel that they had to shut [her brother] up. He asked Isabel to lie about her relationship with Wallace and told Diazs father that he should testify that Diaz was lying. In exchange, Wallace offered to pay the family $50,000. The government argued that whether or not Wallace was allowed to withdraw his guilty plea, Wallaces actions on the trip to Rio Grande City were relevant to the case, and Schwartz would potentially be put in the position of being called as a witness against his client. Both Schwartz and Wallace objected to the governments motion and submitted affidavits denying the supporting allegations. The district court held a hearing on the motion to disqualify and, in a subsequent written order, disqualified Schwartz on the ground asserted by the government.

Following Schwartzs disqualification, attorney John O'Gara entered his appearance on behalf of Wallace. O'Gara immediately filed an amended motion to withdraw Wallaces guilty plea. Whereas the Schwartz motion

to withdraw the plea had argued that the government was impermissibly shifting theories from a single conspiracy to multiple conspiracies, the O'Gara motion focused principally on the conflict of interest between Schwartz and Wallace that (it argued) tainted the original guilty plea proceedings. Schwartz, Wallace now urged, had a powerful motive to induce Wallace to plead guilty, because by avoiding a trial, Schwartz could avoid having his unethical and potentially criminal conduct come to light. In his amended motion, however, Wallace made clear that he was not conceding any wrongdoing while visiting Diazs family: The defendant by this motion does not admit to the governments allegations in its motion to disqualify Mr. Schwartz. According to Wallace, [t]he actual conflict of interest in this case is created by the governments allegations and implications arising from the allegations. In his amended motion to withdraw, Wallace also alleged for the first time that Schwartz did not fully apprise him of the potential sentence he faced and that Schwartz was confused about the issue. According to Wallace, Schwartz promised that he would only serve five years and that only because of this inducement did he enter a plea of guilty.

The district court denied Wallaces motion without an evidentiary hearing. It rejected Wallace's argument that because his lawyer may have had a conflict of interest at the time of the plea, this was enough in itself to invalidate the plea of guilty. Instead, the court examined Wallace's plea agreement and the earlier Rule 11 colloquy for any evidence that Wallace's plea was not knowing or voluntary. It concluded that Wallace's repeated sworn

statements that he understood that there was no agreement as to sentence belied his claim that Schwartz promised him he would receive five years. Not finding any other evidence of involuntariness or lack of knowledge, and noting that Wallace was not actually asserting that Schwartz improperly pressured or compelled him to enter into the guilty plea, the court saw no grounds for permitting Wallace to withdraw his plea.

Wallace responded to the courts ruling with a motion seeking an evidentiary hearing on the issues raised in his amended motion to withdraw his guilty plea. He made an offer of proof in which he stated that he would testify at an evidentiary hearing that Schwartz and the U.S. Attorney both led him to believe he would receive a five-year sentence and that if he pleaded guilty, one of his co-conspirators, Linda Adams, would be exonerated. The court granted a hearing on the limited issue of what Schwartz had told Wallace about the potential sentence he faced if he elected to plead guilty.

At the hearing, Wallace was the only witness who testified. His statements there amounted to a 180-degree shift from his earlier testimony at the Rule 11 hearing. He claimed that he had not discussed the terms of his plea agreement with Schwartz, that he had not read the plea documents, and that Schwartz did not discuss the sentencing guidelines with him. He testified that he did not understand how relevant conduct would affect his sentence. And he testified that Schwartz had promised him a five-year sentence. The district court was unimpressed. In its order again denying Wallaces motion to withdraw his plea, the court concluded that Wallaces new testimony simply was not credible. Revisiting the conflict issue, the

court supplemented its earlier reasoning with the observation that if Schwartz and Wallace had, as the government alleged, intimidated and attempted to bribe the Diaz family, Wallace was well aware of Schwartz's conflict when he entered his plea and had thus effectively waived his Sixth Amendment right. (If Schwartz had really done nothing, as Wallace was also asserting, then there would have been no conflict that might have tainted his advice.)

The district court held a sentencing hearing on November 1, 2000. Wallace withdrew all objections to the presentence report, but he argued that he should not be sentenced to a term longer than his life expectancy. The court rejected this argument. Wallace also mentioned the Supreme Court's then-recent decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), in order to "save the issue for appeal." The court sentenced Wallace to 240 months and five years of supervised release.

II

Wallace's first three arguments on appeal involve his motion to withdraw his guilty plea. We review the district courts decision denying such a motion for abuse of discretion. *United States v. Milquette*, 214 F.3d 859, 861 (7th Cir.2000). The courts factual findings about the existence (or not) of a fair and just reason to withdraw the plea stand unless they are clearly erroneous. United States v. Messino, 55 F.3d 1241, 1247 (7th Cir.1995).

Federal Rule of Criminal Procedure 32(e) provides that, prior to sentencing, a defendant may be permitted to

withdraw his guilty plea for any fair and just reason. Defendants do not have an absolute right to withdraw a plea, *United States v. Pike*, 211 F.3d 385, 388 (7th Cir.2000), but a defendant is entitled to withdraw his plea if he can demonstrate that it was not entered into knowingly and voluntarily. *United States v. Ellison*, 835 F.2d 687, 692-93 (7th Cir.1987) (lack of voluntariness is a fair and just reason for withdrawing a guilty plea).

Wallace first argues that because Schwartz labored under a conflict of interest, Wallace received ineffective assistance of counsel and thus his plea was not voluntary. In broad terms, it is true that a guilty plea entered by a defendant who has received ineffective assistance of counsel is generally deemed to be involuntary. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). It is also true that under certain circumstances, a defense attorney who has an actual or a potential conflict of interest renders ineffective assistance. *Cabello v. United States*, 188 F.3d 871, 875 (7th Cir.1999). But the link between these two elements – the conflict of interest, and the ineffective assistance – must be demonstrated before the defendant is entitled to withdraw his plea on that basis.

A defendant alleging ineffective assistance must demonstrate both that her attorneys performance fell below an objective standard of reasonableness and that she was prejudiced by this deficient representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the typical case, establishing prejudice requires demonstrating that absent the attorney's deficient performance there is a reasonable likelihood that the outcome of the proceedings would have

been different. *United States v. Henry*, 933 F.2d 553, 561 (7th Cir.1991). Because loyalty to her client is among the most basic of an attorneys duties and [because of] the near impossibility of measuring the precise effect on the defense of representation corrupted by a breach of this duty, however, it is easier to satisfy *Strickland*'s prejudice requirement in a conflict of interest case. *Cabello*, 188 F.3d at 875.

A defendant alleging a conflict of interest can satisfy the prejudice requirement in one of two ways. If the trial judge knew or should have known that a potential conflict of interest existed and did not adequately address the issue with the defendant, then we will presume prejudice. *Lipson v. United States*, 233 F.3d 942, 945 (7th Cir.2000). Alternatively, if the trial judge was not put on notice of a potential conflict, following *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), a court will presume prejudice if the defendant demonstrates that her counsel actively represented conflicting interests and that the conflict adversely affected the counsels performance. *Cabello*, 188 F.3d at 875; see *Cuyler*, 446 U.S. at 348, 100 S.Ct. 1708.

In this case, the governments motion to disqualify Schwartz was the first sign the court had of any conflicts Schwartz might have with Wallace. As the court implicitly recognized, there were two possible areas of conflict. If the government's allegations of Schwartz's participation in witness-tampering were true, then Schwartz had an actual conflict throughout the proceedings, including when he advised Wallace regarding his guilty plea. Even if the government's allegations were not true, however,

the mere fact that Schwartz was charged with wrongdoing created the potential for his interests to conflict with Wallace's, and it certainly created a potential public perception of impropriety. The district court disqualified Schwartz based only on these potential future conflicts. It expressed no opinion on whether the evidence supported the governments charges against Schwartz and thus whether Schwartz had an actual conflict at the time Wallace pleaded guilty.

Before the district court, Wallace argued that Schwartz had an actual conflict at the time he advised Wallace regarding his plea. This is generally a claim made under *Cuyler*. See *Cabello*, 188 F.3d at 874. To prevail, Wallace had to demonstrate with a reasonable degree of specificity that a conflict actually existed, *Henry*, 933 F.2d at 561, and that the conflict adversely affected his representation. Wallace did not attempt to meet these burdens before the district court. Instead, he maintained that an actual conflict arose solely from the "implications" of the government's theory of what happened in Rio Grande City and that the mere possibility of an adverse impact on Wallace's representation was enough to establish a Sixth Amendment violation. In other words, as the district court construed it, Wallace took the position that the possibility of a conflict was, by itself, enough to establish a *per se* Sixth Amendment violation.

On appeal, Wallace again argues for a per se rule, but he does not cite *Cuyler* or offer an argument for why its standards should not apply here. Wallace argues instead that our opinion in *Stoia v. United States*, 22 F.3d 766 (7th Cir.1994), compels a ruling in his favor. We disagree. In *Stoia* we expressly applied *Cuyler* and required that the

defendant demonstrate both the existence of an actual conflict and an adverse impact on his representation. Unlike Wallace, Stoia proved that at the relevant times his attorney had an actual conflict of interest that arose out of a plea agreement that the attorney had entered into with the government. There was no dispute as to the existence of this plea agreement nor was there any dispute as to the competing interests it created for Stoia's attorney. In contrast, Wallace never demonstrated that Schwartz actually participated in any wrongdoing while in Rio Grande City. While this may have been one of the theories behind the government's motion and thus initially its burden, it became Wallace's burden for purposes of the motion to withdraw the plea. The court made no finding on that question, and Wallace submitted an affidavit in which he specifically denied that the events alleged by the government occurred.

Perhaps more importantly, even with the finding of an actual conflict, the *Stoia* court went on to review the defendant's evidence of adverse impact on his representation. Finding none, it rejected his ineffective assistance of counsel claim. In this case, however, Wallace has put forth no actual evidence of an adverse impact. The only evidence to which Wallace points is his testimony at the plea withdrawal hearing that Schwartz promised him a five-year sentence. The district court was correct in this case to reject Wallace's new stance on credibility grounds and to hold Wallace to his earlier sworn statements.

Wallace also relies on *United States v. Cancilla*, 725 F.2d 867 (2d Cir.1984), for the proposition that Schwartz's assistance was per se ineffective and that he is thus entitled to withdraw the plea. Briefly, *Cancilla* held that

specific evidence of adverse impact on representation is not necessary, and that the court would find a Sixth Amendment violation whenever there is a reasonable possibility that the defendant's attorney engaged in the defendant's wrongdoing. See also *United States v. Fulton*, 5 F.3d 605 (2d Cir.1993). But this court, in *Cerro v. United States*, 872 F.2d 780 (7th Cir.1989), has already rejected the *Cancilla* rule. In *Cerro*, the defendant's attorney was implicated in the defendant's wrongdoing, and the defendant argued for *Cancilla* s *per se* rule. This court declined to apply *Cancilla* because the evidence on which the defendant relied to implicate his attorney "did not clearly establish" his involvement in criminal activity and because, even if it did, the *Cancilla* rule would require us to accept the "disingenuous and incongruous" argument that the defendant received ineffective assistance on the basis of a conflict that the defendant was well aware of long before trial. *Id.* at 785. See also *United States v. Montana*, 199 F.3d 947 (7th Cir.1999), which held that the burden is on the defendant to demonstrate that his attorney actually did fear prosecution, and that absent evidence that the attorney actually "pulled his punches," no inference of intimidation could arise. *Id.* at 949.

To the extent that Wallace is implicitly inviting us to reject *Stoia*, *Cerro*, and *Montana*, and to adopt the Cancilla approach, we decline the overture. (We are aware that the Supreme Court has under consideration the case of *Mickens v. Taylor*, 240 F.3d 348 (4th Cir.2000) (*en banc*), *cert. granted*, 532 U.S. 970, 121 S.Ct. 1651, 149 L.Ed.2d 467 (2001), and that *Mickens* may throw some light on the burden a petitioner like Wallace has to prove adverse effect and prejudice under *Cuyler*, when an actual conflict

of interest was present. Anything we hold in this case is obviously subject to modification, depending upon the outcome of *Mickens*.) *Montana*, consistently with *Cuyler*, requires that the defendant show some adverse effect on his representation stemming from his counsel's conflict. As we have already explained, Wallace failed to do so. Because we can resolve Wallace's case this way, we need not delve into some potentially troublesome questions that could arise in other situations. For example, requiring Wallace to demonstrate that Schwartz had an actual conflict at the time Wallace entered his guilty plea would require Wallace to put forward potentially incriminating evidence prior to sentencing; that evidence could at a minimum lead to a higher sentence, a sentence enhancement for obstruction of justice, or additional criminal charges. Such a requirement might have Fifth Amendment implications, and it might not suffice to protect the defendant's Sixth Amendment right to conflict-free counsel. Asking a defendant to prove a crime in which she is implicated would condition her ability to vindicate her right to conflict-free counsel on a self-incriminating statement. But on the record here, the district court properly rejected Wallace's claim that his Sixth Amendment rights were violated, and it did not abuse its discretion in denying the motion to withdraw the plea on the basis of Schwartz's alleged actual conflict.

Wallace next argues that he should have been permitted to withdraw his guilty plea because he did not understand the consequences of that plea. This argument borders on the frivolous, and we reject it. Wallace is trying to overturn credibility findings made by the district court, and in the process he is also denigrating the

solemnity of the Rule 11 proceeding. See *United States v. Stewart*, 198 F.3d 984, 986-87 (7th Cir.1999).

The next arrow in Wallace's quiver is *Apprendi*. He argues that his plea was not knowing and voluntary because the indictment did not specify a quantity of marijuana and the court did not inform him during the Rule 11 colloquy that the government would have to prove drug quantity beyond a reasonable doubt. Wallace did not object to these omissions during the plea colloquy, nor did he raise the issue in either of his motions to withdraw his plea. He mentioned *Apprendi* during sentencing but made no argument to the district court. He merely stated that he wanted "the Seventh Circuit to consider the impact of *Apprendi v. New Jersey* on this case." This is of course not enough to preserve an issue for appellate review. We will thus review Wallace's *Apprendi* claim only for plain error. *United States v. Nance*, 236 F.3d 820, 824 (7th Cir.2000).

Prior to accepting a defendant's guilty plea, a district court is expected to ensure that a defendant understands the elements of the crime to which he is admitting. *United States v. Ranum*, 96 F.3d 1020, 1024 (7th Cir.1996). Since *Apprendi*, it has been clear that to the extent that drug quantity affects a defendant's statutory maximum sentence, it is an aspect of the crime that should be specified in the indictment and must be proven beyond a reasonable doubt. Wallace was sentenced to 20 years. Under the Sentencing Guidelines, in order to receive a sentence for conspiracy to distribute marijuana that is greater than five years but less than forty, the defendant's crime must involve at least 100 kilograms of marijuana. 21 U.S.C. § 841(b)(1)(B)(vii). There was thus error in both Wallace's

indictment and in the plea colloquy. In order to satisfy the plain error standard, however, the mistakes below must have "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). In this case there was no such effect. Wallace has never denied his involvement in the two transactions totaling 1,600 pounds, or over 700 kilograms, of marijuana. To the contrary, he admitted to them under oath, both in his stipulation of facts and during the plea colloquy, and conceded at sentencing that the government could prove at least these two transactions beyond a reasonable doubt. Under these circumstances the *Apprendi* errors in the indictment and plea colloquy do not entitle Wallace to withdraw his plea. *United States v. Gilliam*, 255 F.3d 428, 434-35 (7th Cir.2001) (indictment error not grounds for withdrawal where defendant admitted under oath to necessary drug quantity); *Lee v. United States*, 113 F.3d 73, 75 (7th Cir.1997) (permitting withdrawal of plea only where change in law casts doubt on factual sufficiency of plea).

Finally, Wallace challenges his sentence as unconstitutional because it exceeds his life expectancy. Even assuming for purposes of argument that Wallace adequately established his life expectancy at sentencing, this claim need not detain us for long. Wallace's theory has its origin in *United States v. Martin*, 63 F.3d 1422 (7th Cir.1995). Whatever the language of *Martin* may have suggested, we have since been very clear that its holding is limited to the particular statute and unique circumstances of that case. Moreover, we have rejected the applicability of *Martin*'s holding to convictions and sentences

imposed under 21 U.S.C. §§ 841(a)(1) and 846. See *United States v. Robbins*, 197 F.3d 829, 852 (7th Cir.1999).

III

Because the district court acted within its discretion to deny Wallace's motion to withdraw his guilty plea, and because there was no error relating to the length of the sentence Wallace received, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. RICKEY BRANDON WALLACE, Defendant.	)	Cause No. 97-CR-30006-WDS TO BE FILED UNDER SEAL

MEMORANDUM & ORDER

STIEHL, District Judge:

Before the Court is the government's motion to disqualify Clifford Schwartz as counsel for the defendant Rickey B. Wallace. The Court held an evidentiary hearing on the motion, and took the matter under advisement pending briefing by the parties.

This motion to disqualify comes at an unusual stage of the proceedings, that is just before the defendant[1] was scheduled to be sentenced. In preparation for the trial of defendant Linda Adams, the government learned that a cooperating witness, former co-defendant Ubaldo Diaz, II, was reluctant to testify. Further inquiry by the agents revealed that there was evidence that the defendant may have threatened Diaz and asked his family to lie during

[1] For purposes of this hearing, the Court appointed the office of the Federal Public Defender, Eastern District of Missouri to represent the defendant. Schwartz obtained separate counsel for the purposes of this motion.

visits to Texas while he was on bond awaiting trial. The motion to disqualify is based on the fact that Schwartz was present when these threats were allegedly made.

A. The Indictment

Wallace, Diaz and others were charged by the grand jury in February of 1997 with conspiracy to distribute marijuana. Diaz pleaded guilty on October 2, 1997. In The stipulation of facts, as part of the plea documents, Diaz stated that from 1987 through 1994 he obtained marijuana for the Wallace organization, and transported it from Texas to the Southern District of Illinois.[2]

On February 3, 1998, Wallace entered his guilty plea to Count 1 of the superseding indictment, which was returned on October 9, 1997. Count 1 charged him with conspiracy to knowingly and intentionally distribute marijuana. The defendant also admitted to the charges in Count 2, which seeks forfeiture of cash proceeds of six million dollars and several parcels of property. In his stipulation of facts, Wallace admitted to being the leader of an organization that distributed large quantities of marijuana in the Granite City, Illinois area. He specifically stated that Ubaldo Diaz, II was one of his suppliers.

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[2] [Illegible] to distribute marijuana in the Southern District of Texas. While on bond on that charge, Diaz was arrested in February of 1996, in Texas on state charges of aggravated kidnaping. He has been in state custody since that arrest.

B. The Government's Motion

At the hearing, the government asserted that Schwartz should be disqualified from further representation of Wallace because the alleged threats and bribe attempts occurred in the presence of Schwartz, thereby creating a conflict of interest.

The complexity of this potential conflict became readily apparent at the hearing. In order to preserve the rights of Wallace, the Court was required to appoint counsel to represent him at the hearing. Despite the late hour of their appointment. Wallace's counsel for the hearing vigorously represented him, often having to assert Wallace's attorney-client privilege during Schwartz's testimony when he attempted to detail his conversations with Wallace and the trial strategy they discussed. Moreover, because Schwartz chose to oppose the motion to disqualify and to testify at the hearing, he had his own counsel.

At the hearing, the government introduced the testimony of Isabella Diaz, the sister of Ubaldo Diaz, II. The government also presented the testimony of its case agent, Special Agent Darrin Rentfro of the Drug Enforcement Administration. Agent Rentfro testified that while he was preparing for trial of Wallace's co-defendant, Linda Adams, he learned that Ubaldo Diaz, II was reluctant to testify because he had concerns for his safety. Diaz informed Agent Rentfro that he had been told by his family, particularly his sister Isabella, and his father Ismael Diaz, Sr., that the family had been contacted on two occasions by Wallace and his attorney, and that

threats were made in an attempt to keep Ubaldo Diaz, II from testifying.[3]

C. The Texas visit

At the hearing, both the government and Schwartz presented testimony concerning the Wallace/Schwartz visits to Texas in 1997. Needless to say, the accounts of the visits vary widely.

Isabella Diaz testified that she lives with her father, Ismael Diaz and her mother, and Isabella's three children in Rio Grande City, Texas. She stated that Wallace and Schwartz made two trips to the Diaz family home in 1997. Although she was unable to specify the dates of the visits, one occurred in approximately May of 1997, and the other in early fall, around September. During the May visit, Wallace and Schwartz apparently discussed with the Diaz family a statement given by Ubaldo to DEA in December of 1995, during the investigative stage of this case. A twelve page DEA 6 Investigative Report of the debriefing of Ubaldo Diaz, II was introduced into evidence as Government's Exhibit #1.

Isabella Diaz testified that Wallace was concerned about what Ubaldo would testify to if called as a witness at trial. Wallace asked her and her parents to come to East St. Louis to sit in the courtroom gallery, in the front, so that Ubaldo would not "say too much." Wallace sent

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[3] Specifically, Agent Rentfro testified that the Diaz family had been told that if Ubaldo Diaz, II testified, his arm would be "delivered" to the Diaz family.

airline tickets to Mr. and Mrs. Diaz and Isabella to attend the trial which was scheduled to begin on October 21, 1997. Due to the poor health of Ismael Diaz, Wallace sought a continuance of the trial date so that Ismael Diaz could attend as a material witness.

Isabella Diaz also testified that during one of his visits Wallace offered her family $25,000 to $50,000 for their assistance. The money was apparently offered to help acquire a lawyer for the appeal of another brother, Ismael Diaz, Jr. who is serving a life sentence in Texas for first degree murder. In addition, there may have been some offer by Wallace to help with Ismael Diaz, Sr.'s medical expenses which were substantial. No money was paid to the Diaz family for these purposes. Wallace also allegedly asked Isabella, in Schwartz's presence, to testify that she was Wallace's girl friend. This request upset her because she was already married.[4]

After being advised of his Fifth Amendment rights, Schwartz testified that he had taken Wallace on the first trip to help in the investigation of the case, and on the second to help serve subpoenas. During the first visit they discussed a DEA report which contained Ubaldo's statement. During the first trip, a videotape was made of the Diaz family and their home. This videotape was introduced into evidence at the hearing. Schwartz identified the narrator on the videotape as Wallace. On the tape, Wallace and Ismael Diaz discuss, *inter alia*, the expected testimony of Ubaldo Diaz, II, and specifically deny, in

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[4] The implication of this request was to explain that Wallace's connection to the Diaz family was through Isabella, not through Ubaldo.

clearly self-serving statements, that they were involved in any marijuana dealings with him. Of course, as a result of Wallace's plea, it is clear that the statements made on the videotape, in which Wallace denies marijuana dealings, were not correct statements of the facts. As set forth in the stipulation, Wallace headed a large-scale marijuana distribution network, and Ubaldo Diaz, II was one of his supplies.[5]

Schwartz specifically denied that any threats or offer of payments were made by Wallace while in his presence at the Diaz home in Rio Grande City, Texas. He further testified that he only wanted members of the Diaz family to attend the trial so that Ubaldo Diaz, II would not make misstatements about his dealings with Wallace.

II. ANALYSIS

Generally, a defendant in a criminal case has the right to counsel of his choice. *Wheat v. United States,* 486 U.S. 153, 157 (1988). That right, however, is not absolute. *Id.* at 163. The Seventh Circuit has directed: "In order to explore adequately the risk of conflict of interest, a court must examine facts and details of an attorney's interests to determine whether those interests diverge with those of the client, thereby compromising the adequacy of counsel's representation." *United States v. Fish,* 34 F.3d 488, 493 (7th Cir. 1994).

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[5] In the DEA 6 report, Ubaldo Diaz, II states that he took over the marijuana supply business in 1987 from his father, Ismael Diaz, Sr. who had previously supplied marijuana to Wallace.

The Illinois Rules of Professional Conduct, adopted by this District in **Local Rule 29, Disciplinary Rule IV**, govern the activities of attorneys. **Rule 3.7(b)** specifically provides:

> If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation *until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client.*

A prejudicial situation arises when the conflict of interests "forecloses the use of certain strategies and thus the effect is difficult if not impossible to measure." *United States v. Ellison,* 798 F.2d 1102, 1107 (7th Cir. 1986), *cert. denied,* 479 U.S. 1038 (1987). Moreover, "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court properly when a conflict of interest arises. . . . " *Cuyler v. Sullivan,* 446 U.S. 335, 343 (1980).

Here, as the events of the hearing clearly proved, Schwartz is a potential witness in these proceedings. The government has previously filed its notice to seek an enhancement against Wallace for obstruction of justice. The events alleged in the obstruction involved Schwartz. Because of his presence, he is a potential witness who is subject to being called by either side to testify as to those events.

The Court must also consider the public interest in this matter. Without making any findings with respect to the merits of the government's representations, if they are true, Schwartz may at least face ethical charges, and at

worst, face criminal charges. As the Seventh Circuit stated in *United States v. Marren*, 919 F.2d 61, 63 (7th Cir. 1990), when an attorney is linked to his client's crime, disqualification is warranted. The court held that the attorney was "properly disqualified because identifiable improprieties involving him were shown and because public suspicion would outweigh any interest in his continuing representation." *Id.* In this case, because Schwartz was present at the Diaz home where the illegal actions and offers were allegedly made by Wallace, there is a strong likelihood that the public perception (whether true or not), would be that Schwartz participated, actively or passively, in the attempts to obstruct justice and influence witnesses. Therefore, disqualification of Schwartz is warranted under these circumstances because of the appearance of impropriety in his continued representation of Wallace.

The potential conflicts presented by Schwartz's continued representation are too great to be ignored by this Court. This situation certainly raises the possibility that "the defense attorney [may be] required to make a choice advancing his own interests to the determent [sic] of his client's interests." *Stoia v. United States*, 22 F.3d 766, 771 (7th Cir. 1994), *quoting United States v. Ziegenhagen*, 890 F.2d 937, 939 (7th Cir. 1989). The potential for such a claim is a great concern to the Court, and further warrants the disqualification of Schwartz.

CONCLUSION

Accordingly, the Court **GRANTS** the government's motion to disqualify, and Clifford Schwartz and the law

firm of Schwartz & Ochs, P.C., are hereby disqualified from further representation of the defendant Rickey Brandon Wallace. The Clerk of the Court is directed to forward a copy of this Order to the defendant Rickey Brandon Wallace. The defendant is granted leave to obtain new counsel, and is directed to have his new counsel enter his or her appearance within twenty (20) days from the date of this Order.

IT IS SO ORDERED.

DATED: 9 June 1998

/s/ William D. Stiehl
DISTRICT JUDGE

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment VI. Jury trials for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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21 U.S.C. § 841(a).

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.